

February 6, 2006

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**VIA FACSIMILE AND EMAIL**

NEPA Draft Report Comments  
c/o NEPA Task Force  
Committee on Resources  
1324 Longworth House Office Building  
Washington, DC 20515-6201

Re: Comments on the Initial Findings and Draft Recommendations of the NEPA Task Force  
To the Task Force on Improving NEPA:

Thank you for the opportunity to submit comments on the Initial Findings and Draft Recommendations issued by the Task Force on December 21, 2005. I commend the Task Force for its tremendous work in synthesizing the testimony received over the past several months, and in drafting a set of comprehensive recommendations for the improvement of NEPA. I am pleased to share these comments with the Task Force, and I look forward to continuing to work with Task Force members, other members of Congress, and all interested stakeholders and agencies to improve the NEPA process.

Although the Task Force's recommendations suggest a number of important and worthy amendments to NEPA, I believe that the Task Force's Recommendations 2.2, 4.1 and 5.1 should be enhanced to decrease the uncertainties, costs, and delays inherent in the NEPA process. I also am concerned that the potential unintended consequences Recommendation 7.1, as currently drafted, could have unintended consequences that would work against the Task Force's efforts and could exacerbate some of the difficulties inherent in the present NEPA system. As requested in the Task Force's call for comments, I will address these specific Recommendations in turn.

**Recommendation 2.2**

In Recommendation 2.2, "Amend NEPA to codify the EIS page limits set forth in 40 C.F.R. 1502.7," the Task Force suggests codifying the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects. This recommendation accurately reflects the fact that some projects are more complicated than others, and that agency decision-makers often receive little benefit from a detailed analysis of the environmental impacts associated with a project that has very predictable impacts.

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Although this is an important recommendation, I believe the Task Force could go further than simply limiting the number of pages. In cases where the issues are relatively simple or predictable, the agency should have the express authority to undertake a “Short Form EIS.” In cases where the lead agency is reviewing an activity that has already been approved in essentially the same fashion with essentially the same environmental impacts, the lead agency should be able to: (i) shorten comment periods; (ii) avoid any repetition of pre-existing analyses; (iii) limit the text that the agency otherwise would prepare; and (iv) respond, in a summary fashion, to comments on the EIS. Codifying an agency’s authority to undertake a Short Form EIS recognizes that not all projects have the same complexity. The existence of a Short Form EIS will also allow the agency to reduce the costs and unnecessary delays by streamlining the approval of predictable activity that has limited environmental impacts.

#### **Recommendation 4.1**

In Recommendation 4.1, “Amend NEPA to create a citizen suit provision,” the Task Force sets out to clarify the standards and procedures for judicial review of NEPA actions. The recommendations provide some much needed guidance for a difficult area of NEPA litigation. However, I believe the Task Force could further reduce uncertainties in NEPA case law by expanding the scope of its recommendations to address the issues of intervention and exhaustion.

##### **A. Standards for Intervention**

This recommendation discusses the need to establish clear guidelines on who has standing to *challenge* an agency decision. In addition, however, this recommendation should address more fully the intervention standards for project proponents wishing to help *defend* an agency decision. This Recommendation should be expanded to make clear that project proponents have a right to participate as a party in any stage of NEPA litigation.

Currently, NEPA does not contain a provision addressing intervention by private parties even though project proponents typically have a direct and significant interest in the property or transaction that is the subject of a lawsuit brought under NEPA. Private parties with an economic interest in a project, including project proponents, currently have no assurance that they will be able to defend their projects against attacks brought by project opponents. Instead, project proponents, and others who have an “economic” interest in NEPA litigation, must rely on the Government, whose interest is, of course, not identical to their own, to defend the litigation. Those parties are left to simply hope that the Government’s litigation strategy will incidentally vindicate their rights as well.

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Denying the right to participate in NEPA litigation to the parties who, in many instances, have the strongest tangible interests in the outcome of that litigation not only contravenes fundamental notions of fairness, but it diminishes the NEPA, as well as the judicial process. Congress can alleviate this problem by amending NEPA to make clear that parties whose economic interests are affected by litigation have a right to intervention just as do those parties whose interests are less tangible.

In order to reinforce the right of private participation in the defense of NEPA actions, the Task Force should recommend that NEPA be amended to reflect that: (i) industry has the right to intervene as of right under the Federal Rules of Civil Procedure, and (ii) industry assertions of purely economic harm should be considered to fall within the “zone of interests” protected under NEPA. These two changes should make clear that affected business interests have a right to participate as a full-fledged party in any stage of litigation that challenges a government project’s NEPA compliance.

#### B. Standards for Exhaustion

Exhaustion of remedies is a well-established principle in administrative law: a party must pursue available means of recourse within an agency before resorting to a judicial challenge of the agency’s action. Under the related doctrine of “waiver,” a party must raise a particular issue before the agency in order to be able to pursue a subsequent judicial challenge based on that issue. Recommendation 4.1 proposes a citizen suit provision that would establish guidelines on standing that would take into account “whether the challenger was engaged in the NEPA process prior to filing the challenge.” I urge the Task Force to expand this section of Recommendation 4.1 to explicitly address the issues of exhaustion and waiver.

Unfortunately, where NEPA is concerned, current case law is not clear that parties must raise issues before the agency and must exhaust administrative remedies in order to pursue judicial review. To address this confusion, I suggest that the doctrines of exhaustion and waiver should be codified in NEPA. Specifically, NEPA should be amended to require the timely participation of third parties in proceedings before the agency. The statute should also make clear that parties are required to put agencies on notice of potential flaws in their NEPA analyses by providing sufficiently detailed comments during the public process.

#### Recommendation 5.1

In Recommendation 5.1, “Amend NEPA to require that ‘reasonable alternatives’ analyzed in NEPA documents be limited to those which are economically and technically feasible,” the Task Force takes an important step forward in clarifying that agencies need not examine impacts that are not feasible. However, further clarification is necessary to decrease

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the uncertainty that currently clouds the “reasonable alternatives” analysis. The Task Force should adopt two additional recommendations to further clarify the appropriate scope of the alternatives analysis.

First, in addition to limiting the alternatives analyzed to those that are economically and technically feasible, the NEPA statute should make clear that only “reasonably foreseeable” impacts, with a close causal relationship to the action in question, should be examined by the agency. Furthermore, the Task Force should ask CEQ to set guidelines for what constitutes “reasonable foreseeability” in this context. This recommendation is necessary to reinforce the consensus view that NEPA should not require agencies to predict unpredictable events or quantify unquantifiable risks.

Second, the Task Force should recommend that NEPA incorporate a preference for the use of adaptive management techniques. Currently, agencies embark on time-consuming and expensive processes in order to identify and fill in information gaps when there is incomplete information relevant to reasonably foreseeable significant adverse impacts. Instead, the Task Force should clarify that agencies have the prerogative to develop NEPA documentation based on current information, and may use rigorous adaptive management techniques (i) to adopt more targeted mitigation measures as needed; (ii) to recommend Best Management Practices, and (iii) to generate a Supplemental EIS when there is significant new information on environmental issues that bear on the action. Codifying this practice in the statute will give agencies greater flexibility to reduce costs, reduce delays and utilize their expertise.

### **Recommendation 7.1**

In Recommendation 7.1, “Amend NEPA to create a ‘NEPA Ombudsman’ within the Council of Environmental Quality,” the Task Force seeks to create a NEPA Ombudsman with decision-making authority to resolve conflicts within the NEPA process. The Task Force suggests that this Recommendation could improve the process by offsetting the pressures put on agencies by stakeholders and allowing the agency to focus on consideration of environmental impacts. Although this is a laudable goal, a key weakness of this Recommendation is that it adds another layer of bureaucracy and complexity to the NEPA process that is likely to result in delays in project approvals.

Recommendation 7.1 is somewhat radical because it contemplates that CEQ would play a role in resolving project-level disputes whenever a conflict within the NEPA process arises. In practice, however, the addition of another decisionmaker could undermine the authority of the lead agency and slow down processes such as the review and approval of NEPA projects. In reviewing this initial Recommendation 7.1, I urge the Task Force to consider that lead agencies may perceive the proposed CEQ Ombudsman as a burdensome

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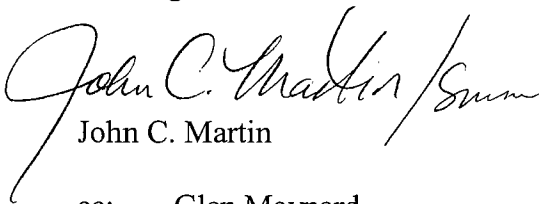
extra layer of management. Turf wars and a lack of information sharing between CEQ and the lead agency could become a concern and slow down the NEPA process. This extra layer of bureaucracy could also have the negative effect of reducing the flexibility of a lead agency that has special expertise over the NEPA project it is managing.

I also urge the Task Force to consider that the addition of another layer of bureaucracy will likely *increase* the amount of litigation that currently flows from the NEPA process. By giving oversight authority to the CEQ, project opponents will have a new administrative forum to challenge lead agency action. Opponents to a NEPA project could potentially argue that every agency decision leads to a "conflict within the NEPA process," and brings numerous administrative challenges before CEQ at the early stages of the NEPA process. Even if the CEQ declined to review the decision or affirmed the agency action, project opponents might then seek to bring suit in federal courts to challenge the action (or lack of action) by the CEQ Ombudsman.

Ultimately, Recommendation 7.1 is likely to have the unintended consequence of increasing delays in the NEPA process, increasing the cost of compliance, and increasing the amount of litigation in a typical NEPA project. For these reasons, Recommendation 7.1 is neither warranted nor beneficial.

I hope that these additional comments are helpful. If the Task Force has any additional questions, please do not hesitate to contact me. Thank you, once again, for creating this public forum and for providing the opportunity to provide input into the efforts of the Task Force.

Best regards,

A handwritten signature in black ink, reading "John C. Martin / Sum". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

John C. Martin

cc: Glen Maynard  
Todd Ennenga  
Rick Axthelm